# RETHINKING THE WTO – A TRIBUTE TO BOB LUTZ

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Over the last thirty years, almost every time I stepped out of my narrow academic path to do something that, I hoped, was for the greater public good, I encountered Bob Lutz. When I worked with the American Bar Association (ABA) to encourage the engagement of its members with first the Soviet Union, and then Russia, Bob was there as a leader in its Section on International Law. A few years later, when I served in the State Department's Office of the Legal Adviser, Bob came to Foggy Bottom to represent the interests of the ABA. A decade after that, when I worked on the American Law Institute's Restatement (Fourth) of the Foreign Relations Law of the United States, Bob served as liaison to the ABA as well as a member of the project's Members Consultative Group. At each stage, he acted as a bridge between the academic community, government, and bar

elsewhere—China and Russia in particular, Argentina, Brazil, India, South Africa, and Turkey—have used their growing influence to challenge the existing order. Today, defenders of international law seem to find themselves back on their heels in the face of onslaughts from all directions.

This essay focuses on one area where Bob has worked for much of his career. As a scholar and practitioner, Bob was a fixture in international economic law, particularly in the law of the World Trade Organization (WTO). Today, that legal regime faces great challenges. Within the United States, a rising tide of anti-globalization in both political parties has sidelined the liberal internationalist policies that motivated the United States from the end of World War II until the Great Recession of 2007-09. Other countries, with less of a commitment to the WTO, have resisted its rules with creative legal theories, a strategy that the U.S. has also adopted. Today, we face a world where the WTO has been robbed of much of its legal bite.

These challenges rest on long

it. This meant that a dissatisfied state could veto any and all panel decisions that did not go its way. The panel opinions instead served as a focal point for settlements.[7]

Under the Uruguay Round Agreements, the Appellate Body has the final say in resolving legal disputes among the members. Only a consensus of the membership, including the state that prevailed in its decision, can reverse it. However, for the Appellate Body to function, people must have valid appointments to it. When fully staffed, it has up to seven members who serve staggered four-

threat and what measures will suffice to abate it. The case serves as a

downwards but not exceed.[27]

viewed as serious and violent domestic opposition to which, they believed, Qatar gave aid and comfort. In both situations, people died and more casualties were expected. By contrast, the U.S. measures invoke no specific threat from any adversary, but rather a general sense that existing trade patterns weaken the country.

Shoe-horning the U.S. argument into the language of Article XXI is a reach. If anything less than unrestrained self-judging applies, the claim should fail. Indeed, a bloody-minded observer could interpret the U.S. position as a deliberate provocation, meant to expose the disconnect between the formal rules that the WTO applies and the actual balance of interests that sustains the multilateral trade regime.

From the WTO's perspective, the absence of a functional Appellate Body means that it lacks a way to reach a definitive legal resolution of these questions. A plausible interpretation of the WTO rules gives no legal effect to a panel's decision when a dissatisfied state has a right of appeal, even though that right is meaningless because of the absence of a working appellate mechanism.[31] As a result, current panel decisions, including those on Article XXI, live in a kind of limbo. Every state that has invoked the national-security exception to call off its WTO obligations can fairly argue that the WTO has yet to decide against it authoritatively. Panels may